

Legislative Brief

Plan Elections for Same-Sex Spouses

December 2015

ACTION NEEDED by 12/31/15: 125 Language & Same-Sex Spouses post-Obergefell

SUMMARY:

- IRS Notice 2015-86 clarifies how IRC §125 cafeteria plan sponsors are to address and document mid-year election changes due to the enrollment of same-sex spouses following the Supreme Court's decision in Obergefell v. Hodges (Obergefell).
- Obergefell held that same-sex couples are entitled to the same federal rights and benefits as opposite-sex couples. Thus, after the announcement plan sponsors permitted same-sex spouses with an opportunity to enroll in benefits. All states must recognize same-sex marriages for federal tax purposes.
- **The Notice clarifies that if an IRC §125 cafeteria plan sponsor permitted its employees to add same-sex spouses to whom they were already married at the time of the Obergefell decision, the cafeteria plan sponsor should review and confirm that its cafeteria plan document contains language that permits elections upon a significant improvement in coverage.** If the plan is silent in this regard, the plan should be amended to reflect this permissible mid-year election change before the end of the plan year in which that change occurred (e.g., if a §125 cafeteria plan has a Jan 1—Dec 31 plan year, the amendment should be adopted by December 31, 2015).

Background

On December 9, 2015, the IRS issued Notice 2015-86 which further clarified guidance published by the IRS concerning the recent Supreme Court decision in Obergefell v. Hodges on same-sex marriages. In Obergefell, the Supreme Court held it was unconstitutional for a state to ban same-sex couples from the fundamental right to marry, thereby legalizing same-sex marriage in all fifty states. Thus, same-sex couples have the same federal rights and benefits as opposite-sex couples. Notice 2015-86 addresses how cafeteria plan sponsors should implement plan elections for benefits by same-sex spouses.

Notice 2015-86 Treatment of Same-Sex Spouses in a Cafeteria Plan

The irrevocability rule applicable to IRC §125 cafeteria plans generally requires that elections made under a cafeteria plan must occur prior to the beginning of the plan year and are irrevocable unless the written cafeteria plan document provides for an IRS permitted mid-year election change.

Notice 2015-86 provides that written cafeteria plan documents, containing language permitting mid-year election changes based on a "significant improvement in coverage," contain language sufficient for a cafeteria plan administrator to execute the enrollment of same-sex spouses.

However, written cafeteria plan documents that do not specifically permit mid-year election changes or have not specifically included the "significant improvement in coverage" exception to the irrevocability rule must be amended to provide for the enrollment of same-sex spouses, if same-sex spouses married prior to the Obergefell decision were added mid-year due to Obergefell. This amendment may be made on a retroactive basis beginning on June 26, 2015, and adopted no later than the last day of the plan year (e.g., for a calendar year plan the plan must be amended by December 31, 2015). To reiterate, this amendment specifically pertains to same-sex marriages that occurred prior to the Obergefell decision.

Action Needed

- ◇ If you do not maintain a §125 cafeteria plan for your employees, this article is not applicable to you and you do not need to take any action.
- ◇ If you maintain a §125 cafeteria plan for your employees, the action needed depends on the action you've taken thus far:

- ⇒ If your cafeteria plan already contains “significant improvement in coverage” language, an amendment is not necessary; no further action is needed.
- ⇒ If your cafeteria plan does not contain “significant improvement in coverage” language, but same-sex couples married prior to Obergefell wait until the upcoming enrollment period to make a change in their benefit elections, an amendment is not necessary; no further action is needed.
- ⇒ If your cafeteria plan does not contain “significant improvement in coverage” language, and you permitted a same-sex spouse married prior to Obergefell to be added to the cafeteria plan mid-year, you must amend the cafeteria plan prior to the end of the plan year, otherwise any added same-sex spouse married prior to Obergefell will be required to pay for the added same-sex spouse on a post-tax basis until the next enrollment period.
- ⇒ For same-sex individuals who married after June 26, 2015, such individuals are afforded the same opportunity to enroll in the plan as any other HIPAA special enrollment right, and no additional amendments are necessary (i.e., they will be added on to the plan on a pre-tax basis like all other spouses); no further action needed.

Plan sponsors are encouraged to examine the terms of their cafeteria plans to determine if any necessary action is needed. If you have any questions, please contact your Client Executive. A sample amendment is available for clients upon request.

The Internal Revenue Code has many complex requirements for employers and §125 cafeteria plans. Please contact Kapnick Insurance Group with any questions about how you can prepare for any of the §125 cafeteria plan requirements. This Kapnick Insurance Group Update is not intended to be exhaustive nor should any discussion or opinions be construed as legal or tax advice. The information contained in this communication is intended to provide general information regarding cafeteria plan and related topics, and is based on general information available at the time it was prepared. Readers should contact their tax and/or legal counsel for advice that is appropriate to their specific circumstances. This information cannot be used by any taxpayer to avoid tax penalties.

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